

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CHARTER TOWNSHIP OF PORTSMOUTH,

Plaintiff-Appellee,

v

JERRY L. WOYS,

Defendant-Appellant,

and

CONNIE WOYS,

Defendant.

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UNPUBLISHED

February 9, 2012

No. 302319

Bay Circuit Court

LC No. 83-003392-CE

Before: FITZGERALD, P.J., and WILDER and MURRAY, JJ.

PER CURIAM.

Defendant Jerry L. Woys<sup>1</sup> appeals as of right from the trial court's order finding him in contempt of court for violating a previous order of the court and imposing sanctions nunc pro trunc. We affirm.

Defendant owns a parcel of real estate in plaintiff Portsmouth Township known as the German Road property. In 1983, plaintiff filed a complaint for injunctive relief seeking to restrain defendant from using his residential property as a junk yard in violation of the Portsmouth Township Zoning Ordinance and Anti-Blight Ordinance. The trial court entered a consent order directing defendant to "keep and maintain the front and yard areas surrounding the . . . garage free of scrap, junk, and disabled equipment and vehicles." Defendant was also required to "perform or permit no activities or conditions on the . . . premises which would constitute an expansion of the activities being conducted on the premises as of September 11, 1984, unless such uses are established entirely within enclosed buildings."

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<sup>1</sup> Use of the term "defendant" refers solely to Jerry L. Woys.

In the years that followed, plaintiff filed numerous verified petitions for order to show cause, each alleging a failure on defendant's part to comply with the consent order. In 1997, one such petition resulted in the issuance of an injunctive order by the trial court, as well as a finding that defendant was in contempt of court. The trial court later entered an order purging this contempt and amending the prior consent order to include more specific restrictions on the use of defendant's property.

Subsequently, plaintiff filed yet another verified petition for order to show cause alleging that defendant failed to comply with the amended consent order. Following oral arguments and multiple personal visits to the property, the trial court issued a written opinion and order on March 25, 1999, finding defendant in contempt of court and ordering defendant to take numerous remedial actions. The order provided in part:

IT IS FURTHER ORDERED that in the event defendant fails to comply with the foregoing:

1. The defendant shall cease and desist from any commercial operations or storage of any materials not presently permitted under the zoning ordinances as if a non-conforming use did not exist. (Emphasis in original.)

Plaintiff filed another verified petition for order to show cause pursuant to MCR 3.606(a) in July 2009. At an August 24, 2009, hearing on the motion for order to show cause, defense counsel asked the court to make a home visit and view the property. Defense counsel also stated that there was no need for the court to issue an actual order to show cause because "we have appeared and answered." The trial court held a hearing on September 10, 2010. The trial court provided the parties with an opportunity to present proofs in the form of testimony or evidence, but both parties declined. The trial court noted that it had again visited the property. The court reiterated the terms of its prior orders and found that "defendant has not complied with the prior orders of the court" and that defendant "is wholly ignoring the Court's directives through its court order to remediate the property in question." The court also noted that its March 25, 1999, order required defendant to do certain things, including, among other things:

The defendant shall not bring any additional materials for storage or otherwise onto either the German Road property or the Green Road property without giving the Township prior, 48-hour notice if the defendant intends to bring such property onto his property for storage and permit the plaintiff to inspect and photograph such material. . . .

The Court noted that "there's a great deal of additional materials that were brought onto that property" and that defendant "brought on materials that are clearly not licensed motor vehicles, that are clearly inoperable heavy equipment, heavy, . . . It's not just a small amount of junk or debris. It's heavy." The court also noted that the March 25, 1999, order provided the additional sanction that if defendant failed to comply with the terms of that order, that defendant was required to "immediately cease and desist from any commercial operations or storage of any materials not presently permitted under the Portsmouth Township Zoning Ordinance, and remove all materials, debris, equipment, and junk not specifically authorized by Portsmouth Township Zoning Ordinance. . ." Additionally, the court noted that defendant

[H]as flaunted this Court's order to clean the property up. Quite the contrary, he defies the order by continually bringing in inoperable items and storing them for a period of time and then they – I don't know if they're sold for scrap or what happens to them, but there clearly was more property brought on, more junk, if you will, or inoperable equipment and materials that were brought onto that Green Road property as well as the German Road – I mean, I should say the German Road property as well as, frankly, the Green Road property.

This – This case has come back to visit me, I think, four – three, four, or five times now since I've been on the bench and it seems like the sanctions aren't working that have been imposed in the past. They simply aren't working.

[Defendant] has taken it upon himself to maybe be compliant for a little bit and then he continues to bring junk, if you will, onto the – onto the property.

And I indicated in my previous orders that no commercial operations and if he did have a non-conforming use, by violating the Court's order, he – he is – the only way to stop that would be to say he doesn't have a non-conforming use anymore. It's not a commercial zoning.

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. . . I'm gonna order that – Well, besides finding the defendant in contempt of Court, then as a remedy, the defendant may purge himself of the contempt of Court by removal of all materials from the German Road property on or before December 1<sup>st</sup> except for licensed, personal motor vehicles.

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If it's not done by December 1<sup>st</sup> of 2010, then the Court will consider – frankly, I – I was thinking about levying jail right now. If it's not done by then, it's clearly that he hasn't purged himself of the contempt powers of the Court and I will order the defendant serve jail time.

On January 10, 2011, the court entered an order nunc pro tunc finding defendant in contempt of court for failure to comply with prior court orders and imposing sanctions.

We review a trial court's issuance of a contempt order for an abuse of discretion. *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). An abuse of discretion occurs when a trial court selects an outcome result outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Defendant first argues that the trial court erred procedurally by entering a contempt order without ordering defendant to show cause and thereby giving defendant an opportunity to present evidence. An issue is preserved for appellate review if it was raised before, addressed, or decided by the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Whether the trial court complied with the procedural requirements of the applicable court rule was an issue that was not raised before, addressed, or decided by the trial court.

Therefore, this issue is not preserved. *Id.* Unpreserved issues are reviewed for plain error affecting defendant's substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

MCR 3.606(A), which is the court rule under which plaintiff brought its verified petition for an order to find defendant in contempt, provides that if contempt is committed outside the immediate view and presence of the court, the court may "order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct." Minimal due process requires that a defendant be informed of the nature of the charge and given time to prepare his defense, secure the assistance of counsel, and produce witnesses on his behalf. *In re Contempt of Henry*, 282 Mich App 656, 672; 765 NW2d 44 (2009).

In this case, defendant waived the requirement of the court ordering defendant to show cause when his counsel stated on the record at a hearing on August 24, 2009, that defendant was treating plaintiff's verified petition for order to show cause "as a motion" and that there was no need for the court "to issue an actual order to show cause." Thus, no plain error occurred. Further, the trial court informed defendant of the "dire" consequences that defendant would face if he failed to comply with prior court orders, including the possibility of jail time, which put defendant on notice of the nature of the charge brought against him. Furthermore, defendant had months to prepare a defense, retain counsel, and the opportunity to present a defense. Defendant's due process rights were not violated by issuance of the order of contempt.

Defendant also argues, however, that the trial court lacked the authority to terminate his nonconforming use by way of a contempt order, even if the finding of contempt was legally and procedurally proper. We disagree.

The March 25, 1999, order provided that if defendant failed to comply with the terms of that order then defendant would be required to "cease and desist from any commercial operations or storage of any materials not presently permitted under the zoning ordinance as if a nonconforming use did not exist." The language regarding forfeiture of the legal non-conforming use status of the property was included as a means of coercing defendant to comply with the court's order within a particular time period. Defendant did not appeal this order, the time for an appeal has passed, and defendant cannot now bring a collateral attack on its provisions. See, e.g., *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006).

Nonetheless, a court may take advantage of an expansion of a nonconforming use to compel a complete suppression of the nonconformity. *Austin v Older*, 283 Mich 667, 675-676; 278 NW2d 727 (1938), quoting Williams, Law of City Planning and zoning (1<sup>st</sup> Ed), pp 202-203; *Charter Twp of Breitung v Zeeb*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2000 (Docket No. 219336), slip op at 5. Accordingly, the trial court's act in this case of totally suppressing the nonconforming use fell within his remedial powers. Moreover, because defendant was on notice of the possibility of a suppression of the nonconforming use as a consequence of noncompliance with the March 25, 1999, order, because defendant had a hearing at which he could have presented evidence to demonstrate compliance with the order, because the trial court found that defendant's act of noncompliance was willful, and because a court may

completely suppress a nonconforming use when the property owner improperly expands the nonconforming use, the trial court's action was appropriate.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder

/s/ Christopher M. Murray